

IN THE SUPREME COURT OF IOWA

Supreme Court No. 16-0076

United States District Court for the Northern District of Iowa No.
5:15-cv-04020

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES
MOINES, IOWA,

Plaintiff-Appellant,


vs.

SAC COUNTY BOARD OF SUPERVISORS AS TRUSTEES OF
DRAINAGE DISTRICTS 32, 42, 65, 79, 81, 83, 86, and CALHOUN
COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF
SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 2
AND 51 and BUENA VISTA COUNTY BOARD OF SUPERVISORS and
SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF
DRAINAGE DISTRICTS 19 and 26 and DRAINAGE DISTRICTS 64
and 105,

Defendants-Appellees.

CERTIFIED FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF IOWA
HONORABLE MARK W. BENNETT, DISTRICT COURT JUDGE,
PRESIDING

BRIEF OF AMICUS CURIAE
ENVIRONMENTAL LAW & POLICY CENTER



Joshua T. Mandelbaum (AT0010151)
Environmental Law & Policy Center
505 5th Avenue, Suite 333
Des Moines, IA 50309
Phone: 515-244-0253
Fax: 515-244-3993
Email: JMandelbaum@elpc.org

ATTORNEYS FOR ENVIRONMENTAL LAW & POLICY CENTER

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE IDENTITIES OF THE AMICI CURIAE AND THEIR INTERESTS IN THIS CASE.....	1
ARGUMENT.....	2
I. Introduction.....	2
II. Unlimited Nutrient Pollution Undermines the Public Health, Convenience and Welfare.....	5
III. Iowa Drainage District Law Does Not Provide a License to Pollute Unlimited Quantities of Nitrate.....	11
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE.....	19

TABLE OF AUTHORITIES

State Cases

<i>Board of Supervisors v. District Court</i> , 229 N.W. 711 (Iowa 1930).....	16
<i>Fisher v. Dallas County</i> , 369 N.W.2d 426 (Iowa 1985).....	16
<i>Gish v. Castner-Williams and Askland Drainage</i> <i>District</i> , 113 N.W. 757 (Iowa 1907).....	16
<i>Maben v. Olson</i> , 175 N.W. 512 (Iowa 1919).....	16

Federal Statutes and Rules

42 U.S.C. §§ 300f-300j.....	7
40 CFR § 141.62(b)(7).....	7

State Statutes and Rules

IOWA CONST. art. I, § 18.....	16
IOWA CODE Title X, ch. 2 (1873).....	15
IOWA CODE § 139A.21(4).....	9
IOWA CODE §468.1.....	11, 12, 14
IOWA CODE § 468.2.....	5, 13, 14
641 Iowa Administrative Code §1.3.....	9

Legislation

30 G.A. Chs. 67 & 68 (1904).....	16
----------------------------------	----

Other Authorities

Emma Fitzsimmons, <i>Tap Water Ban for Toledo Residents</i> , N.Y. TIMES, Aug. 3, 2014.....	3
EPA, <i>2015 Drinking Water Health Advisories for Two Cyanobacterial Toxins</i> (June 2015).....	9
Iowa Environmental Council, <i>2015 State Park Beach Advisories Report</i>	10
Iowa Department of Public Health, <i>Harmful Algal Blooms</i> , http://idph.iowa.gov/ehs/algal-blooms	9
Iowa Department of Public Health Memorandum on Mandatory Reporting of Exposure to Microcystin (May 15, 2012).....	9
USDA Economic Research Service, <i>Fertilizer Use and Price</i> , Tbl. 10.....	16
Vaclav Smil, <i>Nitrogen cycle and world food production</i> , World Agriculture 2:9, 10 (2011).....	15
Xenia Rural Water District, <i>DRINKING WATER NOTICE</i> (June 17, 2015).....	8

**STATEMENT OF THE IDENTITIES OF THE AMICUS
CURIAE AND ITS INTERESTS IN THIS CASE**

The *amicus curiae* is a not-for-profit environmental organization engaged in protecting Iowa residents' rights to access clean water and reducing pollution across the state. These public interest public health and environmental rights, the scope of applicable state laws and remedies, and the public's rights to implement, enforce and achieve remedies will be impacted by the Court's ruling in this case.

The Environmental Law & Policy Center (ELPC) is a not-for-profit public interest environmental protection and economic development advocacy organization with offices and staff in: Des Moines, Iowa; Chicago, Illinois; Grand Rapids, Michigan; Columbus, Ohio; Jamestown, North Dakota; Madison, Wisconsin; Duluth, Minnesota; and Sioux Falls, South Dakota. ELPC has members residing in Iowa, Illinois and each of the states where it has offices. ELPC works to achieve cleaner air and cleaner water, among other goals, in order to protect public health and the environment in Iowa and the Midwest. ELPC engages in litigation and other forms

of policy advocacy before state and federal courts, state and federal administrative agencies and federal, state and local legislative bodies. In particular, ELPC has devoted significant time and resources to advancing cleaner air and cleaner water in Iowa.

ELPC represents statewide public interest environmental and public health interests that extend beyond the scope of the local private lawsuit that is on appeal. ELPC works to reduce pollution by advocating, implementing and enforcing laws to achieve clean air and clean water, and seeks to enforce rights and remedies, including damages and injunctive relief, under both federal and state law. The questions presented to the Court will affect ELPC's abilities to protect the environment and public health and achieve cleaner water for all Iowans.

ARGUMENT

I. Introduction

Several recent events have elevated awareness of the public health issue of safe drinking water. In the summer of

2014, agricultural pollution caused a toxic algal bloom in Lake Erie that contaminated the drinking water supply of Toledo, the fourth largest city in Ohio with a half-million residents. Emma Fitzsimmons, *Tap Water Ban for Toledo Residents*, N.Y. TIMES, Aug. 3, 2014. Algal blooms on Lake Erie are a major public health threat because the lake serves as a drinking water source for 11 million people who live nearby it. *Id.*

More recently, the lead poisoning of children in Flint, Michigan has demonstrated the exigency of access to safe drinking water. The catastrophe in Flint was set in motion decades ago when the city used lead service pipes to connect water mains to end users' homes. Both the dangers of the lead in those pipes and the possibility that those pipes would disastrously corrode were not fully appreciated at the time. The recent switch to a more corrosive drinking water source unleashed the lead in the pipes exposing thousands of children in the process and capturing the attention of the nation.

Des Moines Water Works (DMWW) has faced significant challenges to providing safe drinking water due to high levels

of upstream nitrate pollution for decades. Public health crises percolate before becoming catastrophes where a community of half a million loses its drinking water for days or thousands of children are put at risk for lead poisoning. DMWW has hovered on the cusp between public health crisis and public health catastrophe as it has been forced to deal with a constant barrage of nitrate pollution and new record highs of nitrate pollution seemingly every season.

Rather than wait for the ongoing public health crisis to become catastrophic, DMWW decided to act by filing a lawsuit in federal district court against Sac, Calhoun, and Buena Vista County Board of Supervisors as Trustees of ten drainage districts. DMWW's lawsuit attempts to create accountability for the significant amount of pollution being sent downstream by drainage districts. The drainage districts claim that Iowa case law makes them immune from legal action, but the Iowa cases have never addressed a water pollution case.

Iowa has a water quality public health crisis that threatens safe drinking water sources and has led to a record number of instances of public beaches being unsafe for

swimming. The defendants' theory of unqualified immunity gives drainage districts free reign to pollute. Unqualified immunity for drainage districts removes any incentive the drainage district has to help limit pollution and leads to severe consequences. The Court should find that the presumption of public benefit underlying unqualified immunity can be rebutted and give DMWW the opportunity to do so.

II. Unlimited Nutrient Pollution Undermines the Public Health, Convenience and Welfare.

DMWW argues that the Court resolve a question of first impression about whether the unqualified immunity for drainage districts may be rebutted under the facts of this case. The current unqualified immunity is based on the presumption that drainage is “a public benefit and conducive to the public health, convenience, and welfare.” IOWA CODE § 468.2(1). There has never been a drainage district case that addressed immunity in the context of environmental pollution, and environmental pollution harms the public health and welfare.

Defendants make an argument for an unqualified right to pollute that emphasizes one aspect of public benefit without consideration of public health and welfare. In its reply brief in federal district court, Defendants make a case for the benefits of nitrogen fertilizer and suggest that the DMWW suit puts billions of dollars of land at risk. (Dkt. 42 at 4-5.) The Defendants' argument presents a false choice. It is possible to recognize the benefits of nitrogen fertilizer to agriculture and society without conceding the need for nitrogen pollution that has severe consequences for water quality. Furthermore, it is possible to preserve the benefits of nitrogen fertilizer use while curbing nutrient pollution. Unqualified immunity for drainage districts removes any incentive the drainage district has to help get this balance right and leads to severe consequences.

The results of drainage districts operating under this interpretation of unqualified immunity has been for drainage districts to dump significant amounts of nutrient pollution into Iowa waters with little worry about the consequences. Nitrogen, one form of which is nitrate, and phosphorus are together commonly referred to as "nutrient" pollutants

because they promote plant growth, including the overgrowth of algae. Nutrient pollution is linked to multiple public health problems that are familiar to Iowans and are becoming increasingly more common.

Nutrient pollution makes drinking water sources less safe with high levels of nitrate. Under the Safe Drinking Water Act, drinking water suppliers must meet a 10 mg/L maximum contaminant level for nitrate in the water served to customers. 42 U.S.C. §§ 300f-300j; 40 CFR § 141.62(b)(7). Nitrate concentrations above this level can lead to blue baby syndrome and potential endocrine disruption impacts. Des Moines Water Works' struggles to continue to provide safe drinking water to its 500,000 customers are well-documented. In the district court's Order Certifying Questions to the Iowa Supreme Court the court summarized facts that DMWW had introduced into the record including that in the 20 year period before the DMWW lawsuit "nitrate concentrations in the Raccoon River at the DMWW intake points exceeded the 10 mg/L standard for drinking water at least 1,636 days or 24% of the time" and that more recently nitrate levels had reached

record highs of 24 mg/L for the Raccoon river and 18.6 mg/L for the Des Moines River. (Dkt. 50 at 6.)

Less well-known are the problems that smaller communities around the state face in providing safe drinking water to residents. For example, this past summer Boone Water Works and Xenia Rural Water District were unable to meet the Safe Drinking Water Act standards for nitrate through the typical blending of sources Boone Water Works conducts to reduce nitrate levels. Since they were unable to provide safe drinking water to customers, they warned at risk residents not to drink the water. Xenia Rural Water District, *DRINKING WATER NOTICE* (June 17, 2015), *available at* <http://www.xeniawater.org/admin/controls/alerts/ViewAlertLightview.aspx?id=46678b72-32e2-4917-9b96-4eea484917b5>.

Nutrient pollution also causes algal blooms in rivers and lakes that can threaten human health, aquatic life, and recreation on the water. Iowa is experiencing a greater frequency of harmful blue-green algal blooms or cyanobacteria. Blue-green algae produces toxins called microcystin that cause illness in people and animals. Iowa

Department of Public Health, *Harmful Algal Blooms*, <http://idph.iowa.gov/ehs/algal-blooms> (last visited Feb. 15, 2016). Swallowing or breathing microcystin can cause a range of illnesses including nausea, vomiting, diarrhea, and liver failure. EPA has issued a drinking water health advisory for microcystins. EPA, *2015 Drinking Water Health Advisories for Two Cyanobacterial Toxins* (June 2015), *available at* http://www.epa.gov/sites/production/files/2015-06/documents/cyanotoxins-fact_sheet-2015.pdf.

Swimmers and others out on Iowa waters are exposed to toxic microcystin that lead to sickness and pose even greater risk to children and pets. The Iowa Department of Public Health has exercised its authority under 641 Iowa Administrative Code § 1.3 to designate suspected or confirmed exposures to microcystin as a reportable disease in Iowa. *See* IOWA CODE § 139A.21(4); Memorandum from Mariannette Miller-Meeks, Director of the Iowa Department of Public Health and Patricia Quinlisk, Medical Director/State Epidemiologist on Mandatory Reporting of Exposure to Microcystin (May 15, 2012), *available at*

http://idph.iowa.gov/Portals/1/Files/EHS/algae_reportable_memo.pdf. The Department of Natural Resources monitors state park beaches for microcystin in the summer months. DNR posts warnings when the microcystin exceeds 20 µg/L, a guideline established by the World Health Organization. The last four years have seen increased warnings compared to the previous four, and 2015 saw 34 different instances of beach warnings, a record number of warnings. Iowa Environmental Council, *2015 State Park Beach Advisories Report*, <http://www.iaenvironment.org/webres/File/Program%20Publications/2015%20State%20Park%20Beach%20Advisories%20Report.pdf> (last updated Sept. 3, 2015). These warnings only account for the beaches monitored by the state. There have been increased beach warnings at Saylorville, which is monitored by the Army Corps. In addition, many of the waters where Iowans recreate are not monitored at all.

Iowa is experiencing significant consequences to public health and welfare from uncontrolled nutrient pollution. Iowa's drinking water sources struggle to meet safe drinking water standards, and beaches are becoming unsafe for swimming.

These problems are preventable if there is some accountability for the consequences of pollution. The drainage district law requires consideration of public health and welfare. IOWA CODE § 468.2(1). Under the current unqualified immunity, agricultural pollution is contributing to a growing public health crisis in Iowa's water. Left unchecked, these problems will continue to get worse. Defendants propose to broaden the existing unqualified immunity for drainage districts to include unlimited environmental pollution. This interpretation fails to account for public health and threatens all waters in the state not just the drinking water in Des Moines. In cases where there is harm from a drainage district's environmental pollution, drainage districts should be held accountable.

III. Iowa's Drainage District Law Does Not Provide a License to Pollute Unlimited Quantities of Nitrate.

In the federal district court, Defendants argued that they are simply making farmland more productive and doing nothing more than what the legislature intended them to do. (Dkt. 42 at 5.) Defendants remarkably read the drainage

district law as a license to pollute in unlimited quantities, but the drainage district law provides no such authorization. Nor could the legislature have contemplated this consequence when it drafted the drainage district law. Defendants use the history of unqualified immunity as the key part of their rationalization for this license to pollute unlimited quantities, but neither the drainage district statute nor the initial cases interpreting it could have contemplated and accounted for today's massive quantities of nitrate pollution. Furthermore, this approach necessitates reading out the statute's important balancing of public health and welfare.

Iowa Code Section 468.1 provides the jurisdictional scope of the drainage district law and reads:

The board of supervisors of any county shall have jurisdiction, power, and authority at any regular, special, or adjourned session, to establish a drainage district or districts, and to locate and establish levees, and cause to be constructed as hereinafter provided any levee, ditch, drain, or watercourse, or settling basins in connection therewith, or to straighten, widen, deepen, or change any natural watercourse, in such county, whenever the same will be of public utility or conducive to the public health, convenience or welfare.

Iowa Code Section 468.2 provides guidance on the construction of the drainage district law and reads:

1. The drainage of surface waters from agricultural lands and all other lands, including state-owned lakes and wetlands, or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare.
2. The provisions of this subchapter and all other laws for the drainage and protection from overflow of agricultural or overflow lands shall be liberally construed to promote leveeing, ditching, draining, and reclamation of wet, swampy, and overflow lands.

Drainage districts have the authority to move water off the land. Nothing in the code sections laying out the jurisdiction of drainage districts or the construction of the drainage district statute explicitly provides any license to pollute the water.

There is no implicit authority for water pollution either. Defendants make an argument that the drainage district law implicitly allows for significant pollution, because the goal of the statute is “to allow landowners to make farmland productive.” (Dkt. 42 at 5.) This is a significant broadening of the statute and incompatible with what the drafters of the drainage district law could have contemplated.

Defendants' argument stretches the intent of the law in extreme ways to further one narrow purpose, agricultural production, and in doing so discounts or disqualifies any other public health and welfare result. The law is not simply an agricultural production law. The jurisdictional language makes no mention of agriculture, instead requiring drainage "be of public utility or conducive to the public health, convenience or welfare." IOWA CODE § 468.1. This certainly includes benefiting agriculture, but it clearly has a public health and welfare purpose as well. The presumption requires balancing these factors and assumes that drainage is both "a public benefit and conducive to the public health, convenience, and welfare." IOWA CODE § 468.2. Defendants' theory renders the public health and welfare purposes meaningless. According to defendants, as long as agricultural production increases, there is no public health or welfare consequence severe enough to limit their right to pollute. This would be an unprecedented result and one that no legislature that meant to account for public health and welfare would intend.

Defendants specifically refer to the benefits of the Haber process. (Dkt. 42 at 4 (“Some attribute up to half the world’s food production to nitrogen created through the Haber process.”).) The Haber process is named for the German chemist Fritz Haber who was the first person to successfully fix atmospheric nitrogen in laboratory in 1909. Vaclav Smil, *Nitrogen cycle and world food production*, World Agriculture 2:9, 10 (2011). This led to the development of synthetic nitrogen fertilizer and its application in modern agriculture, although this use did not take off until after World War II. *Id.* The drafters of the drainage district law could not have possibly intended to account for the use of synthetic nitrogen fertilizer and the possibility of accompanying pollution since the legislature enacted the earliest provisions of the drainage district law several decades before the commercialization of synthetic nitrogen fertilizer. IOWA CODE Title X, ch. 2 (1873). In 1904, the legislature passed a more detailed drainage district law. 30 G.A. Chs. 67 & 68 (1904). In 1908, the Iowa Constitution was amended to add specific language authorizing drainage districts. IOWA CONST. art. I, § 18. The

development of the drainage district law preceded the widespread use of nitrogen fertilizer in Iowa. Peak use of nitrogen fertilizer in Iowa was even farther away. See USDA Economic Research Service, *Fertilizer Use and Price*, Tbl. 10, <http://www.ers.usda.gov/data-products/fertilizer-use-and-price.aspx#26720> (last updated May 27, 2011) (showing 45 pounds nitrogen per acre of corn in Iowa in 1964 compared to a peak of 145 pounds of nitrogen per acre of corn in Iowa in 1985 and 142 pounds of nitrogen per acre of corn in 2010).

Similarly, the origins of the judicially created unqualified immunity predate the Haber process and widespread use of nitrogen fertilizer in Iowa.

In developing its current notion of immunity for drainage districts the *Fisher* Court relied on a series of cases from 1907 to 1930 for the principle that a drainage district is not susceptible to suit for money damages. *Fisher v. Dallas County*, 369 N.W.2d 426, 429 (Iowa 1985) (citing *Board of Supervisors v. District Court*, 229 N.W. 711 (Iowa 1930); *Maben v. Olson*, 175 N.W. 512 (Iowa 1919); *Gish v. Castner-Williams and Askland Drainage District*, 113 N.W. 757 (Iowa 1907)).

These cases could not have contemplated the possibility of significant nitrogen pollution and should not be read to create a license to pollute.

The defendants' position attempts to use the drainage district law and court cases on drainage district immunity to create an unqualified right to pollute. This position is unsupported by the drainage district statute, and at best has never been contemplated in the drainage district cases defining the contours of the unqualified immunity for drainage districts. The Court should find that the presumption of public benefit underlying unqualified immunity can be rebutted and give DMWW the opportunity to do so.

CONCLUSION

The Environmental Law & Policy Center respectfully requests that the Court limit the nature of the unqualified immunity that currently exists for drainage districts by allowing for the presumption that districts are for the public benefit and conducive to public health, convenience and

welfare to be rebutted and the Plaintiff's tort claims to go forward.

Dated: February 16, 2016.

Respectfully submitted,

/s/ Joshua T. Mandelbaum
JOSHUA T. MANDELBAUM
(AT0010151)
Environmental Law & Policy
Center
505 5th Avenue, Suite 333
Des Moines, IA 50309
Phone: 515-244-0253;
Fax: 515-244-3993
Email: JMandelbaum@elpc.org

ATTORNEY FOR THE
ENVIRONMENTAL
LAW & POLICY CENTER

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 2,962 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Office 2010 in font size 14 and type style Bookman Old Style.

/s/ Joshua T. Mandelbaum
Joshua T. Mandelbaum
Staff Attorney
Environmental Law & Policy Center
505 5th Avenue, Suite 333
Des Moines, Iowa 50309
Phone: (515) 244-0253
Email: JMandelbaum@elpc.org

2/16/2016
Date